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Nos. 03-1164 and 03-1165

In The
Supreme Court of the United States

AUG 17 2004

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, et al.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, et al.,

Respondents.

NEBRASKA CATTLEMEN, INC., et al.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF MICHIGAN PORK PRODUCERS ASSOCIATION, INC., ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

These *amici* are six state pork producer associations[2] and three hog farmers.[3] *Amici* are the petitioners in No. 03-1043, which is being held in abeyance by the Court pending the decision in this case. Each of the six *amici* state associations is governed through an open, democratic process and has been "recognized by the chief officer of such State as representing such State's [pork] producers." 7 C.F.R. § 1230.25.

In their pending petition, *amici* have asked this Court to review and reverse a decision of the United States Court of Appeals for the Sixth Circuit invalidating on First Amendment grounds a $50 million federal agricultural program – the Pork Promotion, Research and Consumer Information Act of 1985 ("Pork Act"). *See* 7 U.S.C. § 4801, *et seq.*; *Michigan Pork Producers Assn., Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003). The Pork Act imposes a $.40 per $100 value nationwide assessment on sales of swine or their slaughter for sale. This assessment is analogous to a .4% tax (and is characterized as a "Pork Tax" by its opponents). As specifically directed by Congress in 1985, the "Pork Tax" funds (in part) generic advertising to encourage Americans to eat more pork. The text of each and every

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative, Inc., and Ohio Pork Producers Council.

[3] High Lean Pork, Inc., Pete Blauwiekel and Bob Bloomer.

advertisement is reviewed, edited where appropriate, and specifically approved in advance by full-time employees of the U.S. Department of Agriculture.

By all objective standards, the Pork Act has been enormously successful. According to a recent, independent, peer-reviewed economic study that was mandated by Congress and took three person-years to complete, the Pork Act delivers at least $4.79 in returns to pork producers for each $1 in assessments. The demand enhancement activities (such as generic advertising) are particularly effective, and provide even higher positive returns of $15.26 to each $1 invested. Conservatively, the Pork Act results in a net price increase of $1.17 per hog sold in the United States. These are across-the-board benefits to *all* pork producers, large and small. *Amici* doubt that many federal programs could pass such a rigorous cost-benefit test.

This case concerns the constitutionality of a similar but not identical program – the Beef Promotion and Research Act of 1985 ("Beef Act"). *Amici* are concerned that a decision by this Court striking down the Beef Act also have the effect of invalidating the Pork Act. The loss of this highly successful and irreplaceable federal program would have serious adverse consequences for the nation's 80,000 plus pork producers.

SUMMARY OF ARGUMENT

This case is about an asserted constitutional right that does not exist – a claimed right to prevent the federal government from telling the public about the merits of eating beef. In fact, there is no constitutional right to keep

the government from speaking. A pacifist may object to an ad for the U.S. Army; a libertarian to an anti-drug message; and a tobacco farmer to a speech by the Surgeon General. But none have the right to enjoin the government from speaking because their taxes or other exactions are being used for those forms of speech. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990).

Of course, this is stating the obvious. But it now becomes necessary to *re*state the obvious, because federal courts of appeals around the country are invalidating federal agricultural programs on First Amendment grounds without considering the undisputed fact that these programs deliver promotional messages endorsed by Congress under the direct supervision of the U.S. Department of Agriculture. Since the government is speaking in each of these programs, their fate should properly be determined by the political process. A few objectors should not be able to shortcut that process by filing a lawsuit – thereby denying everyone in that particular industry the economic benefits that Congress and the executive branch intended to provide.

Unfortunately, in this case, the Eighth Circuit[4] wrote government speech out of the case. It improperly conflated government speech with *Central Hudson*[5] analysis, then it

[4] *Livestock Marketing Assn. v. U.S. Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003).

[5] *Central Hudson Gas and Elect. Corp. v. Public Serv. Comm. of NY*, 447 U.S. 557 (1980).

collapsed *Central Hudson* analysis into the germaneness inquiry set forth in *United States v. United Foods*, 533 U.S. 405 (2001). This meant that the entire decision was controlled by *United Foods* – without that court giving separate consideration to government speech or *Central Hudson* as grounds for sustaining the program. In other words, the Eighth Circuit effectively decided that *United Foods* foreclosed reliance on the government speech doctrine, even though this Court had expressly declined to reach the govern-ent speech doctrine in *United Foods*. *See* 533 U.S. at 417. This Court, *amici* respectfully suggest, needs to do better.

Consistent with its own precedents, this Court should hold that agricultural commodity programs constitute "government speech" whenever they deliver a legislatively endorsed message under the active and direct editorial control of a government agency – especially where the government literally *owns* that speech. 7 C.F.R. § 1260.215. At the same time, this Court should reject efforts to draw artificial and unrealistic lines based on whether the program benefits "public" or "private" interests, whether it is supported by general revenues or an "assessment," or whether the literal speaker or original author of the message is a regular employee of the government. Those distinctions are not warranted by this Court's precedents and do not go to the essence of whether the government is speaking. Most importantly, they could lead to the invalidation of many other valuable government programs and hamstring the government's ability to deliver information-based services.

ARGUMENT

I. This Court's Prior Decisions Have, With Some Degree of Clarity, Marked a Sensible Dividing Line Between Private Speech and Government Speech.

If one thinks about it, "government speech" ought to be fairly simple. The critical consideration should be whether a government message is being delivered under the actual control of the government. Whether the speech happens to benefit one sector of the economy should be unimportant, because the vast majority of government programs (and certainly all agricultural programs) have targeted benefits. Similarly, whether the speech is funded by general tax revenues or not should be of little importance, because governments raise money in many different ways. Likewise, whether the initial author or the ultimate speaker of the message works full-time for the government should be irrelevant, because the government routinely uses private contractors to perform these kinds of services.

To date, this Court's decisions have generally adhered to this line of reasoning. Thus, this Court has found that **private speech** includes:

- Ideological activities of the Detroit Federation of Teachers that are unrelated to collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977).
- Statements made by the State Bar of California lobbying for or against state legislation on polygraph testing, possession of armor-piercing ammunition, rights to sue, etc. *Keller*, 496 U.S. at 15-16.

- Statements made by 343 different student organizations at the University of Virginia, which had contractually agreed they are neither part of nor controlled by the University. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 823-25 (1995).
- Statements made by student organizations at the University of Wisconsin such as Future Financial Gurus of America, the International Socialist Organization, the College Democrats, the College Republicans, and the American Civil Liberties Union Campus Chapter. *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 223 (2000).
- Statements made by Legal Services attorneys representing welfare claimants. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 538-39 (2001).

At the same time, though, this Court has found that **government speech** includes:

- Invocations delivered by students (where the students chose the texts of the invocations) pursuant to school district policy before high school football games. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-09 (2000).
- Statements made by physicians on family planning topics carrying out a federal program to support preventive family planning. *Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991).

The Beef Act falls on the government speech side of this dichotomy. It is not like *Rosenberger* or *Southworth* – where the government decided to let a hundred flowers bloom, and then refused to water one of them. Nor does this case involve speech by an outside actor intending to

influence the government, as in *Abood*, *Keller*, or *Velazquez*. (Indeed, it is strictly forbidden for Beef Checkoff funds to be used to influence legislation or governmental policy. 7 U.S.C. § 2904(10); 7 C.F.R. § 1260.169(e).)

Rather, since 1985, the government through its elected representatives has chosen to convey the message to the public that beef "is a valuable part of human diet," 7 U.S.C. § 2901(a)(1), just as it has chosen to fund countless advertisements that drugs and smoking are harmful to health. The generic ads run by the Beef Board and qualified state beef councils, under the editorial scrutiny of USDA, are delivering a government message to eat beef. 7 U.S.C. § 2901(b). It was Congress – not some unelected private entity – that decided in deliver this message. "The simplest and clearest example of government speech advancing a point of view is provided when a 'law' specifically adopts a program of promoting a specific message." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 *Iowa L. Rev.* 1377, 1384 (2001). That is exactly what happened here in 1985.

Furthermore, it bears particular emphasis here that, unlike in *Rust*, a federal cabinet department has not merely decided on a general message and left it to others to deliver, but that department actually reviews in advance and (where necessary) disapproves advertisements. *If these ads involved private speech, one might ask, why is USDA telling the Beef Board and state beef councils what to say? Would that not be a flagrant First Amendment violation?* Indeed, prior restraints, such as USDA performs on Beef Act-funded advertisements and producer communications, raise the most serious First Amendment concerns and – as a practical matter – are almost never sustained against constitutional attack. *See New York*

Times Co. v. United States, 403 U.S. 713 (1971) (the Pentagon Papers case). Yet prior, content-based restraints are the norm with respect to Beef Act-funded speech, demonstrating that this is government, not private, speech.

Moreover, the Beef Act is subject to "traditional political controls." *Southworth*, 529 U.S. at 229. It could be terminated through the normal legislative process (and indeed its opponents have lobbied unsuccessfully for its termination).[6] In short, the government has more control over the message being disseminated than it had in *Rust* and *Santa Fe*. Since those cases were found to involve government speech, this case clearly does.

II. A Number of Lower Courts Have Been Ignoring that Dividing Line and Instead Relying Upon Irrelevant Factors.

Aside from the Eighth Circuit, which really declined to give separate consideration to the government speech doctrine, lower courts that have refused to hold that agricultural commodity programs involve government speech generally have cited three factors in their opinions:

- The primary purpose of these programs is to benefit a specific industry. *Michigan Pork Producers Assn.*, 348 F.3d at 161; *Cochran v. Veneman*, 359 F.3d 263, 274 (3rd Cir. 2004); *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 432 (5th Cir. 2004).

[6] Additionally, many of the federal commodity promotion programs – although not the beef program – can be terminated by the Secretary of Agriculture at his or her discretion. This subjects the program to an additional political control. *See* 7 U.S.C. § 4812(a) (giving the Secretary of Agriculture discretion to terminate the pork program).

- The funding for these programs does not come from general tax revenues, but from assessments on the beneficiaries of those programs. *MPPA*, 348 F.3d at 162; *Pelts & Skins*, 365 F.3d at 430, 432.
- The government itself does not generally propose or draft the advertisements. *MPPA*, 348 F.3d at 162; *Pelts & Skins*, 365 F.3d at 432.

Yet there is no reason why these factors should be determinative. The plain facts are:

1. Virtually all government programs are targeted to particular groups or industries.

2. Governments are creative at raising money and levying various taxes, assessments and user fees all the time. In tight budgetary times, these kinds of exactions tend to proliferate, as elected representatives take the view that those who directly benefit from a government program ought to pay for it.

3. Much of what the government says is not the original work product of its own employees.

Hence, a government speech test based on these three factors would inevitably call all sorts of federal programs into question.

To begin with, most federal programs – not just the Beef Act – are designed to benefit a particular group. That is often Congress's intent, *i.e.*, to help one sector of our economy, in the belief that this makes America stronger and better as a whole. Congress demonstrated this intent when it enacted the Pork Act: "Congress finds that . . . the production of beef and beef products plays a significant role in the Nation's economy of the United States. . . . [T]he maintenance and expansion of existing markets for

beef and beef products are vital to . . . the general economy of the Nation . . . ." 7 U.S.C. § 2901(a). Congressional intent to benefit a specific industry is not a reason for striking down a federal program.

Furthermore, most of us cannot write like Ralph Ellison, Edith Wharton, or F. Scott Fitzgerald. Federal employees are no exception. Like the rest of us, therefore, they frequently borrow from, ratify, approve, or adopt the speech of others. However, it does not make speech any less the government's because the government asked people with greater ability and expertise to craft the government's message.

Just as the government routinely contracts for outside services in other areas, in this case the Department of Agriculture has partnered with experts, subject to various controls over the final product. If carried to its logical conclusion, the position of those lower courts could bar the government from obtaining private assistance in any communications-related area. To put it another way, no one would suggest that under the First Amendment, a pamphleteer is entitled to less protection because he or she did not "create" the pamphlet. By the same token, however, the government must be permitted to speak through speech "created" by others as well. Indeed, that is one teaching of *Rust*.[7]

Lastly, much of what our government does is not funded by general revenues. The government levies all

[7] The Army did not invent "Be All You Can Be" or "An Army of One"; each of these slogans was developed by a private ad agency. Furthermore, the actors who deliver the voiceovers in Army recruiting ads typically are not federal employees.

kinds of narrowly focused taxes, user fees, and assessments – on vehicles, gasoline, airline tickets, etc. This has nothing to do, logically or legally, with whether the speech funded by that exaction is that of the government. It would be absurd to say that an airline passenger has a First Amendment right to enjoin an airport authority from displaying an anti-terrorism message in an airport terminal, just because that message was funded by security fees imposed on that passenger rather than general tax revenues.

Moreover, the suggestion that government speech has to be financed from general tax revenues flies directly in the face of both *Rosenberger* and *Southworth*. In *Rosenberger*, the funding mechanism was "a mandatory fee of $14 per semester assessed to each full-time student." 515 U.S. at 824. Yet, when this Court indicated that the University of Virginia could "disburse[] public funds to private entities to convey a governmental message," *id.* at 833, it was taking for granted that this $14 per student per semester assessment amounted to "public funds." The constitutional problem did not arise from the fee, but from what the university was doing with it. Specifically, the university was utilizing the fee "to encourage a diversity of views from private speakers" while also imposing a content-based restriction. *Id.* at 834.

Similarly, in *Southworth*, 529 U.S. at 229, this Court said, "The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties" (emphasis added). This Court added, "If the challenged speech here were *financed by tuition dollars* and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.*

(emphasis added). Thus, according to *Southworth*, government speech may be financed by "other exactions," not just by general revenues.

By any reasonable standard, the Beef Act assessment – which is analogous to a flat per-head tax and is paid by corporations, partnerships and individuals alike – is less targeted than the fees that were involved in *Rosenberger* and *Southworth*.

III. Failure to Reaffirm That Dividing Line Here Could Jeopardize Many Valuable Government Programs.

This is not just a case about agricultural commodity programs. Failure to recognize the proper boundaries of the government speech doctrine here could have far-reaching reverberations.

For example, under the Food, Drug & Cosmetic Act, drug manufacturers seeking approval of a new drug must file an application and pay a user fee. 21 U.S.C. §§ 355, 379h. That fee covers the costs of the Food & Drug Agency's review process. FDA then assigns an advisory panel (comprised exclusively of private individuals) to review and report back on the drug. *Id.* § 355(n). Under the rationale of recent agricultural commodity decisions, one could easily argue that system violates the First Amendment. It is an "abridgment" of drug manufacturers' First Amendment rights because they have to pay for speech by advisory panel members with which they may disagree.

California has a $.25 per pack surtax on cigarette sales to fund various programs, including anti-tobacco advertising. In other words, California uses taxes paid by a specific

industry to fund advertising that condemns that industry. Is this government speech? If it is unconstitutional to impose an assessment on an industry to fund speech benefiting it, then logically the same must be true of an assessment to pay for speech attacking that industry. The federal district court in California upheld the surtax based on the government speech doctrine. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1104 (E.D. Cal. 2003).

Many governments use special taxes or assessments (such as on hotel rooms or rental cars) to promote tourism. For example, Hawaii has a Tourism Authority (a public agency, although its members are not state employees). The Tourism Authority receives most of its funding from a transient accommodations tax, then transfers much of that funding to a private entity known as the Hawaii Convention and Visitors Bureau. The HCVB recently has come under criticism for its spending and management practices. *See* Honolulu Advertiser, January 10, 2004. Under the reasoning of the lower courts discussed above, it would seem relatively easy for someone to shut down the HCVB by bringing a First Amendment claim, arguing that he or she had to pay the accommodations tax, thinks Hawaii's beaches are getting too crowded, and objects to paying for advertising that touts Hawaii's sunshine and temperate climate. Or, objection could be raised to some other aspect of HCVB's advertising, such as a controversial recent joint promotion with Disney.

IV. This Court Should Not Downplay the Importance of Federal Promotional Legislation Such as the Beef Act and the Pork Act.

Finally, this Court should not underestimate the dollars-and-cents importance of federal agricultural commodity programs. The hard economic evidence shows

the benefits of generic advertising to all producers, large and small. It is undisputed that generic advertising works for everyone in the industry by increasing consumer demand and thus the overall price level – and that branded advertising would not be an adequate substitute. In the Pork Act litigation, the Act's opponents tried to develop their own economic evidence, hiring an agricultural economist from the University of Wisconsin, but they gave up when their economist testified that the congressionally-mandated study was a "pretty good study." Slogans like "Beef, It's What's for Dinner" and "Pork: The Other White Meat" may seem to be more flash than substance, but the fact is that they have put millions of dollars into the hands of the nation's livestock producers by getting the nation's consumers to eat more beef and pork.[8]

And that is what Congress intended. For example, the official House Report to the Food Security Act of 1985 (which included both the Beef Act and the Pork Act) states as follows regarding the purposes behind the Pork Act:

> Because today's pork products are leaner than before, American consumers need to know that pork and pork products should play a significant role in their diets, and pork is an excellent food value from an economic and health standpoint. That is the role that pork promotion has to play – to inform the consuming public that pork not only tastes good, but is a positive nutritional

[8] Lacking hard economic evidence, opponents of these programs consistently rely upon the *post hoc propter hoc* fallacy – *i.e.*, because people are leaving farming, these programs must not be working. The congressionally-mandated independent study of the pork industry concluded that the Pork Act had actually ameliorated the decline in numbers of hog farmers.

> component in a healthy, balanced diet. Promotion, research and consumer information will assist to enhance the acceptability of pork products while minimizing their cost and thus the pork sector of agriculture viable vis-à-vis its competitors.

H.Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1294 (1985).

It would be ironic if these successful programs vanished simply because Congress tried to make them *too fair* – that is, to impose their costs through a broad-based assessment on the people and entities who benefit from them – and *too effective* – that is, to utilize at minimal cost the expertise of those who work in the industries, while making every word ultimately subject to the editorial control of full-time federal employees.

CONCLUSION

This Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit and uphold the constitutionality of the Beef Act.

Respectfully submitted,

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